SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 334

THE UNITED STATES OF AMERICA, APPELLANT

vs.

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION; J. M. NICHOLSON, ROBERT R. LUMSDEN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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2 In the United States District Court for the Northern District of Illinois, Eastern Division

No. 48–C–1023

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, FOR AND ON BEHALF OF THE UNITED STATES, PLAINTIFF

v.

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION; J. M. NICHOLSON, ROBERT R. LUMSDEN, CHARLES W. ZERLER, NATHAN SUCHERMAN, SAMUEL SHRAYER, MILTON TINSLEY, FRANK FERRARO, HELEN FERRARO, JOHN J. CHALMERS, DEFENDANTS

Be it remembered, that on to wit, the 14th day of July 1948, the above-entitled action was commenced by the filing of a Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action No. 48–C–1023

UNITED STATES OF AMERICA, PLAINTIFF

v.

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION; J. M. NICHOLSON, ROBERT R. LUMSDEN, NATHAN SUCHERMAN, MILTON TINSLEY, FRANK FERRARO, HELEN FERRARO, JOHN J. CHALMERS, SAMUEL SILVERMAN, ARTHUR J. CASEY, MAURICE LIPKIN, CHARLES E. KOCH, CHARLES H. BRANDT, CLIFFORD CULLODEN, JEROME A. CUTLER, HARRY TARLER, EUGENE B. FEINGOLD, HERBERT S. KOHN, AND IRVING KALLICK, DEFENDANTS

Supplemental complaint

Filed June 23, 1949

Now comes Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, for and on behalf of the United States, and for supplemental complaint herein, filed and served pursuant to leave granted by the order of this court on the — day of —— 1949, alleges:

(1) Supplemental Plaintiff (hereinafter referred to in this supplemental complaint as "Plaintiff"), is the United States of

America and invokes the jurisdiction of this Court under subsection (b) and (c) of Section 206 of the Housing and Rent Act of 1947, as amended, 50 U. S. C. App., Secs. 1881 et seq., Public Law 31, 81st Congress, 1st Session), hereinafter referred to as the "Act."

(2) Tighe E. Woods is the duly appointed, qualified and acting Housing Expediter of the Office of the Housing Expediter, and in his judgment, the defendants have engaged in, or are about to engage in, acts and practices hereinafter more particularly alleged, which constitute, or will constitute, a violation of Section 206 (a) of the Act and of other provisions of the Act applicable in the premises.

5 (3) At all times mentioned herein, on and after July 1, 1947, there has been, and is now, continuously in full force and effect, issued pursuant to Section 204 (d) of the Act, a Rent Regulation for Controlled Housing, as amended, hereinafter referred to as the "Controlled Regulation," which duly fixed and prescribed the lawful maximum rents for the use or occupancy of housing accommodations or rooms in the Chicago Defense-Rental Area.

(4) The acts or transactions constituting the violations herein more particularly alleged, or parts thereof, occurred within the district whereof this Court has jurisdiction.

(5) The defendant, Shoreline Cooperative Apartments, Inc., a corporation organized and existing under the laws of the State of Illinois, was at all times material hereto, the owner, operator and manager of premises situated at 2231 East 67th Street, Chicago, Illinois. The said premises are located within the defense-rental area of Chicago, which is so designated by the Controlled Regulation issued under the Act. Said premises contain dwelling units which constitute controlled housing accommodations within the meaning of the Act and the Regulations issued thereunder.

(6) At all times material hereto, said housing accommodations have been, and are now, let and rented out to various tenants for dwelling units.

(7) At all times material hereto, the defendant, Shoreline Cooperative Apartments Inc., in the operation and management of the premises, has been, and is now, under the Act and Controlled Regulation, entitled to receive rentals for the aforesaid housing accommodations; that the aforesaid defendant has been, and is now, demanding, collecting and receiving rents from the tenants in said premises for the use and occupancy of the housing accommodations in said premises.

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(8) The Housing and Rent Act of 1947, as amended, was amended by the Housing and Rent Act of 1949 (Public Law 31, 81st Congress, 1st Session), and Section 209 of the Housing and Rent Act of 1949 provides as follows, to wit:

6 "EVICTION OF TENANTS

"SEC. 209. Whenever in the judgment of the Housing Expediter such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any controlled housing accommodations, which in his judgment are equivalent to or are likely to result in rent increases inconsistent with the purposes of this Act."

(9) Pursuant to the authority granted the Housing Expediter in the aforesaid Section 209, the Controlled Regulation was amended by Amendment 77 (14 F. R. 1570 et seq.) effective April 1, 1949. Said Amendment 77 added Section 825.6 to the Controlled Regulation, which said Section, insofar as pertinent hereto, provides as follows:

"SEC. 825.6. Removal of tenant (a) Restrictions on removal of tenant.—So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for surrender or possession, or for entry of judgment upon the tenant's confession for breach of the covenants thereof, of which otherwise provides contrary hereto, except on one or more of the grounds specified in this paragraph (a), or unless the landlord has obtained a certificate in accordance with paragraph (c) of this section: Provided, however, That no provisions of this section shall be construed to authorize the removal of a tenant unless such removal is authorized under local law.

* * * * *

"(c) Eviction certificate: grounds for issuance.—No tenant shall be removed or evicted on grounds other than those stated in paragraph (a) of this section, unless on petition of the landlord the

Housing Expediter certifies that the landlord may pursue his remedies in accordance with the requirements of local law. The certificate shall authorize the pursuit of local remedies at the expiration of the waiting period specified in paragraph (d) of this section. The Expediter shall so certify if he finds that removals or evictions of the character proposed are not inconsistent with the purposes of the act or this regulation and would not be likely to result in the circumvention or evasion thereof. The Expediter shall so find in the following cases:

7 "(1) Occupancy by owner.—Where the landlord, who is the owner of the housing accommodations, establishes that he seeks in good faith to recover possession thereof for his immediate and personal use and occupancy as housing accommodations, or for the immediate and personal use and occupancy as housing accommodations by a member or members of his immediate family (see definition of 'immediate family' at the end of this subparagraph (1)): Provided, however, That:

* * * * *

"(b) In the case of housing accommodations in a structure or premises owned by a cooperative corporation or association, no certificate shall be issued by the Expediter to a purchaser of stock or other evidence of interest in such cooperative, who is entitled by reason of such ownership of stock or other evidence of interest to possession of such housing accommodations by virtue of a proprietary lease or otherwise, unless stock or other evidence of interest in the cooperative has been purchased by persons who are tenants in occupancy of at least 65 percent of the housing accommodations in the structure or premises and are entitled by reason of such ownership to proprietary leases of housing accommodations in the structure or premises;"

(10) Section 825.6 (h) of the aforesaid Regulation, as amended by Amendment 85 (14 F. R. —), duly issued by the Housing Expediter, and effective on April 15, 1949, provides as follows:

"(2) The provisions of this section shall not apply to any case in which judgment was entered prior to April 1, 1949, by a court of competent jurisdiction for the eviction or removal of a tenant from housing accommodations: Provided, however, That the provisions of this section shall apply unless said judgment was obtained in accordance with the provisions of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948."

(11) The defendant, Shoreline Cooperative Apartments, Inc., a corporation, is, and was, at all times material hereto, a cooperative corporation or association within the meaning and intent of the

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aforesaid Section 825.6 (c) (1) (b) of the Controlled Regulation, as amended. The following named defendants are the purchasers of stock or other evidence of interest in the cooperative corporation, or have entered into contracts for the purchase of such stock or interest in said cooperative corporation; and plaintiff is informed and believes, and so states the fact to be, that said purchasers of stock are entitled, by reason of said ownership in the stock, to proprietary leases of certain of the housing accommodations involved herein:

8

Samuel Silverman.
Arthur Casey.
Maurice Lipkin.
Charles E. Kock.
Charles H. Brandt.
Clifford Culloden.
Jerome A. Cutler.
Milton Tinsley.
Harry Tarler.
Eugene B. Feingold.
Herbert S. Kohn.
Irving Kallick.
Nathan Sucherman.
J. M. Nicholson.
Robert R. Lumsden.
John J. Chalmers.
Frank Ferraro.
Helen Ferraro.

hereinafter referred to as the "Other Defendants."

(12) Plaintiff alleges that there are persons in occupancy of the housing accommodations herein involved who have also purchased, or contracted to purchase, stock or other evidence of interest in said defendant cooperative corporation, but that said persons occupy less than 65 percent of the housing accommodations located in the premises herein involved.

(13) Plaintiff further alleges that in violation of Section 825.6 (c) (1) (b) and 825.6 (h) of the Controlled Regulation, the defendant cooperative corporation and the Other Defendants have instituted proceedings, or taken other action, for the purposes of removing or evicting the tenants from the said housing accommodations without first having obtained from the Housing Expediter a certificate authorizing the pursuit of local remedies for said eviction purposes in accordance with the terms and provisions of the aforesaid Sections of the Controlled Regulation; that plaintiff is informed and believes, and so states the fact to be, that the Other Defendants have actions pending in the Municipal Court of Chicago for the purpose of evicting or removing the said tenants, or have instituted other proceedings for said purposes, and unless restrained and enjoined herein, will proceed to remove or evict the said tenants without having obtained the necessary certificate as aforesaid; that the numbers of the housing accommodations in the premises, the names of the

tenants occupying the same and the names of the Other Defendants seeking possession as aforesaid are as follows:

Apt. No.	Name of tenant in possession	Name of other defendant seeking possession
7A	Irving S. Bickson	Nathan Sucherman.
13B	Stella Counselbaum	J. M. Nicholson.
12A	Harold Shilling	Robert R. Lumsden.
6B	Isadore H. Besser	Charles H. Brandt.
4B	J. J. Cavanagh	Charles E. Koch.
6C	Mrs. Harry A. Dober	John J. Chalmers.
7D	Milton M. Friedman	Harry Tarler.
11C	R. H. Keeling	Frank and Helen Ferraro.
8D	Bertha Levy	Eugene B. Feingold.
9A	W. P. Littell	Arthur J. Casey.
9C	Mrs. Frank McCool	Jerome Cutler.
7C	Mrs. James Neidlinger	Clifford Culloden.
5D	Mrs. James Nolan	Milton Tinsley.
9D	Harry Stillman	Herbert S. Kohn.
3B	Lillian M. Swing	Maurice Lipkin.
4A	James W. Watson	Samuel Silverman.
13D	B. R. Hopper	Irving Kallick.

(14) Plaintiff alleged that unless restrained and enjoined, the defendant, Shoreline Cooperative Apartments, Inc., and the Other Defendants, will proceed in their attempt to evict and remove the tenant-occupants from the aforesaid premises, and may succeed in effecting the removal of the said tenants in occupancy of the said premises, all contrary to the provisions of the Act and Sections 825.6 (c) (1) (b) and 825.6 (h) of the Controlled Regulation.

(15) The action of all of the defendants herein, and each of them, in the respects aforesaid, if continued, will succeed in unlawfully effecting the removal of the actual tenants and each of them from their apartments and thereby deprive them and each of them of their rights and protection under the Act and the Controlled Regulation issued thereunder. The plan and device followed in such course, moreover, will, if allowed to become widespread, seriously undermine, if not wholly nullify, the emergency policy and intent of Congress manifest in the aforesaid statute to prevent overcharges in rent and to protect and continue all tenants in their use or occupancy of dwelling premises for such time as the maximum rentals lawfully determined therefor are paid or tendered to the persons entitled thereto.

(16) Plaintiff, in view of defendants' past conduct, believes and alleges that unless restrained and *enjointed*, defendants will operate, and continue to operate the said housing accommodations in violation of said Act and the Controlled Regulation as aforesaid, and in other respects, all to the prejudice of the public welfare.

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10 Wherefore, plaintiff prays:

(1) A preliminary and final injunction enjoining the defendants, and each of them, their agents, servants, employees, attorneys, and all persons in active concert or participation with defendants, from:

(a) Removing, or evicting, or attempting to remove or evict, any tenant from the housing accommodations in the premises hereinbefore described, upon any ground, or for any other purpose not expressly permitted by the Housing and Rent Act of 1947, as amended, or by the Controlled Housing Rent Regulation, as amended issued pursuant thereto, or as hereafter amended or extended, in such cases made and provided.

(b) Engaging in any action or course of action, the purpose of which is to evict illegally tenants from the above-described premises or any other housing accommodations owned, controlled or managed by the defendants, or each of them, or from evicting said tenants in any form or manner, contrary to the Housing and Rent Act of 1947, as amended, and the Regulations issued thereunder, as heretofore or hereafter amended or superseded.

(c) Proceeding with prosecuting, continuing, or causing to be continued, or taking any steps whatsoever, either directly or indirectly, any civil actions or proceedings brought by the said defendants, for the purpose of removing or evicting the tenants in occupancy of the premises herein involved.

(d) Committing any violation of the above Act or the Regulation issued thereunder, as heretofore or hereafter amended, extended, or superseded.

(2) Judgment for the Plaintiff in behalf of the United States in the amount of the costs of this action.

(3) And for such other relief as the Court may find necessary and appropriate to effectuate the purposes of the Housing and Rent Act of 1947, as amended, or to which the plaintiff may be entitled.

UNITED STATES OF AMERICA,

11 By William S. Kaplan,

WILLIAM S. KAPLAN,

Attorney, Office of Housing Expediter,

Attorney for Plaintiff.

[*Duly sworn to by William S. Kaplan; jurat omitted in printing.*]

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13 In the United States District Court

[Title omitted.]

Motion of defendant, Shoreline Cooperative Apartments, Inc., and all divers third party defendants to dismiss the supplemental complaint of plaintiff

Filed June 24, 1949

Now comes defendants, Shoreline Cooperative Apartments, Inc., a corporation, and third party defendants, Samuel Silverman, Samuel Schrager, Arthur J. Casey, Maurice Lipkin, Charles E. Koch, Charles H. Brandt, Clifford Culloden, Jerome A. Cutler, Milton Tinsley, Harry Tarler, Eugene B. Feingold, Herbert S. Kohn, and Irving Kallick, and each of them by Mayer Goldberg and Leonard L. Levin, their attorneys, and move the court to dismiss the supplemental complaint herein for the following reasons:

14 1. Said supplemental complaint and the original complaint herein failed to state a claim upon which relief can be granted.

2. The statute described in paragraph 8 of said supplemental complaint (Section 209 of Housing and Rent Act of 1949) is void because it violates the rights of each of third party defendants as established and granted by Section 1 of Article I and Paragraph 18 of Section 8 of Article I of the Constitution of the United States of America.

Shoreline Cooperative Apartments, Inc., Samuel Silverman, Samuel Schrager, Arthur J. Casey, Maurice Lipkin, Charles E. Koch, Charles H. Brandt, Clifford Culloden, Jerome A. Cutler, Milton Tinsley, Harry Tarler, Eugene B. Feingold, Herbert S. Kohn, and Irving Kallick, third party defendants, by Mayer Goldberg, Leonard L. Levin, Attorneys for said defendant and third party defendants, 33 North La Salle, STate 2-5397.

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16 In the United States District Court

[Title omitted.]

Motion of defendant, Robert R. Lumsden, to dismiss the supplemental complaint of plaintiff

Filed July 5, 1949

Now comes defendant Robert R. Lumsden, by Kenart M. Rahn, his attorney, and moves the court to dismiss the supplemental complaint herein for the following reasons:

1. Said supplemental complaint and the original complaint herein failed to state a claim upon which relief can be granted.

2. The statute described in paragraph 8 of said supplemental complaint (The Housing and Rent Act of 1949) is void because it violates the rights of the said defendant as established and granted by Section 1 of Article I and Section 8 of Article I of the Constitution of the United States of America.

ROBERT R. LUMSDEN,
By KENART M. RAHN,
Attorney for said defendant and cross-claimant, 7 South Dearborn Street, FRA 2 4996.

17 In the District Court of the United States for the Northern District of Illinois, Eastern Division

Civil Action No. 48–C–1023

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, FOR AND ON BEHALF OF THE UNITED STATES, PLAINTIFF

v.

SHORELINE COOPERATIVE APARTMENTS INC., A CORPORATION, J. M. NICHOLSON, ROBERT R. LUMSDEN, CHARLES L. ZERLINER, NATHAN SUCHERMAN, SAMUEL SHRAYER, MILTON TINSLEY, FRANK FERRARO, HELEN FERRARO AND JOHN J. CHALMERS, DEFENDANTS

Opinion

The precise question for decision in this case is the validity of the Housing and Rent Act of 1949 because the only basis or reason for claiming jurisdiction in this Court is founded upon that Act. If the Act is constitutional and valid, I have jurisdiction to proceed and determine the issues in question. If the Act is not constitutional I have no power to proceed further. An unconstitutional Act is void at all times and for all purposes, and because

jurisdiction can neither be conferred nor waived by consent of the parties it is a question that may be raised at any time in any court. It would be inadvisable for me to proceed further without deciding that basic question, and reluctant as I am to assume so grave a responsibility I must do so.

By bench announcement at the conclusion of the arguments, and after consideration of the original briefs, I have made it clear that I consider the local option provisions of the present Act to be unconstitutional and void (Sec. 204j, 1, 2 and 3). I shall presently express my reasons for so holding. At that time I stated that I would consider the further question as to whether or not the invalidity of those provisions rendered the entire Act void and would announce my final conclusions in a written opinion. Since that time the parties have filed additional briefs and at my request have submitted to me all those portions of the Congressional Record appearing to be pertinent to the subject, with various passages marked by counsel. I have considered all of these, together with the additional briefs, and after much study and thought am now ready to give my final decision.

Specifically, as to the so-called "local option" provisions, I have never entertained any doubt after reading the original briefs and reading the provisions themselves. No contention has been presented by any counsel in this suit, nor as far as I can learn in the halls of Congress, that this Act is based upon anything except the war powers of Congress, and frequent references to the Congressional Record indicate that those war powers were hardly ever mentioned in debate or reports of committees. The entire theory of Congress is that it is desirable to continue rent controls for a limited time, but in the preamble to the Act it is first stated and most definitely stressed that it is desirable to be through with those controls as rapidly as possible, and the debates of Congress, as well as the preamble to the Act in question, have reference to the economic aftermath of war—none of them to continuation of hostilities nor any reference to the successful prosecution of war. In this opinion I am definitely refusing to consider any facts, although it is obvious to everyone that these rent controls are continued for economic reasons only and that they have no real reference to the prosecution of any war anywhere. Since we have signed no treaties of peace, I assume that we are still at war and that Congress still possesses full war powers. The only question is whether or not the present Act is within the power granted to Congress to declare war, and the implied power to take any act or pass any law to carry that power of declaration into full force and effect. In short, I am assuming that Congress still has the power to enact a valid Rent Control Act.

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This brings into immediate focus the question of whether the Act under consideration is within those powers. Inasmuch as this law was only passed a few months ago, and there has been no opportunity for its interpretation by our highest court, I am forced to consider previous decisions on previous Acts and from there to proceed as with any other case of first impression.

Perhaps it is well to start this way. Our United States Supreme Court and the Supreme Courts of many States have many times pointed out that a frequent recurrence to fundamental principle is necessary to the maintenance of our constitutional form of government and this is especially true when legislation is passed under the war powers, because they are invariably brought forth under the fervor of patriotism and the all-prevailing desire of Congress and the Court to aid and not impede the ultimate victory which everyone desires. It has been true after every war and is true after the most recent one that the fundamental principles of the Constitution are likely to be invaded, and unless from time to time we revert to those principles we may eventually find that the liberties of the people and the limitations of the Constitution have been seriously eroded if not completely impaired.

I start with the fundamental principle that Congress has only such powers as are given to it by the Constitution or necessarily implied therefrom to carry those powers into effect, and with the second fundamental principle which is also expressed in the Constitution that all powers not therein expressly given to Congress or prohibited to the States are expressly reserved to the States and to the people. It is also necessary to consider that further constitutional provision that no State shall pass any law impairing the obligation of contract. The present controversy involves all of these provisions.

I am aware of the holdings in Block v. Hirsh, 256 U. S. 135, and Marcus Brown Holding Company vs. Marcus Feldman, 256 U. S. 170, and it may be that under those two decisions the provisions of the Constitution prohibiting any State to pass any law impairing the obligation of contract has itself materially been impaired. These cases, however, concerned the police power of Congress in the District of Columbia and the State Legislature of New York. It would be inappropriate and unjudicial of me to utter any criticism of any decision of the United States Supreme Court. It must be pointed out, however, that it is generally conceded that outside of the District of Columbia and with other exceptions not necessary to be noted here the Congress possesses no police power (11 Am. Juris. Sec. 255), and since the case can be decided without reference to that particular point, I will pass on it.

As above indicated, I have assumed, and throughout this opinion do assume, that the war powers of Congress still exist, but it becomes instantly necessary to consider whether or not these war powers may be delegated to States, municipalities, or other subdivisions of Government. It will be noted on reading the local option provisions of this Act that no standards are set up either for the determination of basic facts or rules for guidance of the State, municipalities, or other political subdivisions, in determining whether or not they shall remain under rent control. As far as Congress is concerned it has attempted to leave the matter entirely open to arbitrary determination by each State or other subdivision to decide for itself whether or not it wants or needs rent control, and this entirely without rules or guide posts of any kind as to whether or not such rent control may be necessary in connection with the prosecution or maintenance of the war effort.

Thus, in paragraph (j), (1), it provides that whenever the Governor of any State advises the Housing Expediter that the Legislature of such State has adequately provided for the establishment and maintenance of maximum rents or has specifically expressed its intent that State rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such State, etc., all Federal control shall cease. If it were not for the cases of Block v. Hirsh, and Marcus Brown Holding Co. v. Feldman, supra, there could be little doubt that no State would have any power to establish rental controls at all, and even with those two cases in the books it is still doubtful if such power exists in any State except under some emergency exercise of police power. Certainly, no State could exercise any portion of the war power. No definition is given as to what a State must do adequately to provide for the maintenance of maximum rents. There is no guide as to what constitutes sufficient housing or what should constitute maximum rents. The effect is to leave that question to the arbitrary action of any State.

Section (j) (2) is even broader and more loose in its provisions for discarding Federal rent control. That section merely provides that if any State (without reference to any war effort or without reference to any reason or limitation on its action) declares that Federal rent control is no longer necessary in such State, or any part thereof, all controls shall be immediately dissolved. It is up to the Legislature to act reasonably or whimsically as it may see fit entirely without reference to any war effort.

Section (j) (3) provides for decontrol under even more lax conditions in any incorporated city, town or village, merely upon receipt of a resolution of its governing body adopted for that

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purpose in accordance with applicable local law based upon a finding by such governing body reached as the result of public hearing held after ten days' notice that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village, provided that such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter.

No standard is laid down as to what is or what is not a shortage of rental housing accommodations, nor is there any provision as to the procedure for or findings at a public hearing or how that public hearing is to reach any conclusion upon the question of whether or not rent control is no longer necessary or desirable. Upon the general theory that there are more tenants than landlords this provision would certainly be an undemocratic and unconstitutional way of determining whether or not rents should be controlled and limitations thus kept upon the rights of citizens freely to contract.

Acts of this kind have many times been declared unconstitutional. As near as I can determine from the decided cases it is not only permissible but necessary that power be delegated to administrative officers or agencies to determine the facts and apply the law to the facts as thus determined. Illustrations of this are too numerous to mention, such as the first and second war power acts, as well as many others, but this is the first case that has come to my attention in which Congress has attempted to leave it to other legislative bodies arbitrarily to determine whether or not they would be within or without the union so far as an Act of Congress is concerned—an Act which must depend upon the war power if it has any foundation at all. I can see no difference between this situation and one in which Congress should pass a selective service law with the provision that any State which doesn't care to send soldiers may pass a law and say they did not choose to be involved, or an Interstate Commerce Act with the provision that any State that chose not to be governed thereby could declare itself out. I can see no reasonable reason to believe that an Act of Congress under its war powers can contain any such provisions as might make it inoperative at the option of any or all of the various states or subdivisions of States, by their arbitrary action and without guides, standards or specifications of facts.

This is not intended to indicate any doubt on my part that war powers may operate with inequality as among different States or portions of States if those inequalities necessarily result from substantial facts determined by lawful authority. Thus, I can see no objection to a Rent Control Act which is made applicable to

various parts of the country depending on different states of facts and different conditions and necessities for carrying on the war, provided there is a pattern to follow and proper executive or administrative means laid out for its apportionment. Thus, when the Rent Control Act was passed it was recognized that there were vital defense areas in which controls must be exercised and these were to be determined by duly authorized administrators. Thousands of other executive orders of the first and second war powers Act were likewise delegated to administrators to determine the facts and to apply the law as the facts might warrant. The vice of the present law lies in its capriciousness, inequality of application, and total lack of any relationship between the carrying on of the war and the application of the law. It amounts to an abrogation of the power of Congress. Two or three States have already declared themselves out, thus repealing the war efforts so far as those States are concerned, and if the other States should see fit to do likewise the Act of Congress would be utterly repealed or completely emasculated without any further act of its own and without regard to any power to make or maintain war.

In the case of Woods v. Miller, 333 U. S. 138, which is relied upon by the plaintiff, the Housing Act of 1947 is sustained as against an attack based upon unlawful delegation of the powers of Congress. However, that Act, as this one, contains the provision:

"The Housing Expediter is hereby authorized and directed to remove any or all maximum rents before this title ceases to be in effect in any defense rental area, if in his judgment the need for continuing maximum rents in such area no longer exists due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met."

Under this provision of the law the Supreme Court in the Woods case, speaking through Mr. Justice Douglas, said:

"Under the present Act the Housing Expediter is authorized to remove the rent controls in any defense-rental area *if in his judgment the need no longer exists by reason of new construction or satisfaction of demand in other ways.* [*Italics supplied.*] The powers thus delegated are far less extensive than those sustained in Bowles vs. Willingham. (321 U. S. 503) Nor is there here a grant of unbirdled administrative discretion. The standards prescribed passed muster under our decisions."

The vice of the present Act lies in the very fact that no authorized person is required to use any judgment and there is a grant of unbridled administrative discretion subject neither to reason nor findings of fact. This delegation of power is not to an administrator whose selection is controlled by Congress but to

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States, municipalities, other subdivisions or town meetings. The case is no authority for the position taken by the plaintiff but rather to the contrary.

It is a grave and serious matter for any Judge or group of Judges to hold an Act of Congress to be unconstitutional. Nevertheless, it must sometimes be done. It was the intention of the framers of our Constitution that Federal Judges should be removed from politics and free from the popular clamor of transitory ideas and it was their intention that the Constitution should be a charter definitely and firmly fixed and to remain forever the the law of the land unless and until it might be amended as therein provided. As Judges, our oath is not to support either the legislative or executive branches of Government, but only to support the Constitution. Unless we adhere firmly to this oath and fearlessly perform our duties as we see them, and to the best of our ability, it will be found some day that the liberties of the people have been eroded and such fundamental principles as the right to private property and freely to contract with respect thereto have been lost. In this connection I am considerably impressed by the language of Mr. Justice Jackson in his special concurrence in the Woods case:

"No one will question that this (war) power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by Judges under the influence of the same passions and pressures. * * *

"Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care. * * *

"I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent—as permanent as the war debts."

It is for these reasons that I have held the local option clauses to be invalid. There remains for consideration the question of whether or not the invalidity of these clauses invalidates the entire Act. That question in turn depends upon a construction of the saving clause (Sec. 305), and the interpretation of this clause must depend upon the intention of Congress as expressed in the preamble of the Act, indicated by the debates of Congress and whether or not it is the intention of Congress that the remaining portions of the Act should prevail with the major portion of its intent expressed in the preamble removed from the Act.

Preamble to the Act of 1949 is to be found in Sections 201 (a) and (b) of the Act of 1947 which are carried forward into the Act of 1949. This preamble declares the policy of Congress under the heading "Declaration of Policy" in the following language.

"(a) The Congress hereby reaffirms the declaration in the Price Control Extension Act of 1946 that unnecessary or unduly prolonged controls over rents would be inconsistent with the return to a peacetime economy and would tend to prevent the attainment of the goals therein declared.

"(b) The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because of the inadequacies of the maximum rents applicable to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency.

"(c) To the end that these policies may be effectively carried out with the least possible impact on the economy pending complete decontrol, the provisions of this title are enacted."

It is clear from a reading of this preamble, which is called a declaration of policy, that the principal object had in mind was to end that control, which it considered no longer desirable and to do so with the least possible impact upon the general economy. It is to be noted that no reference is made to a continuation of the war effort nor is there any definition of defense rental areas except as they had previously been determined by the Housing Expediter.

The principal argument for the plaintiff is based upon Section 305 of the present Act, which is as follows:

"If any provision of this Act or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of the Act, and the applicability of such provision to other persons or circumstances shall not be affected thereby."

It will be noted in considering this Section that the word is "provision," not the plural "provisions."

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It is also to be noted that the reference "to any person or circumstance" is a customary clause added to many statutes by both State and Federal Governments intended to prevent the failure of the entire Act through the failure of some inconsequential portion thereof. A provision such as this is sometimes valid and sometimes invalid and it is a matter of judicial interpretation as to whether a saving clause of this kind can save an entire Act if the very essence and purpose of it is unconstitutional.

The debates of Congress are helpful although not controlling. A study of those debates indicates that very little thought was given to the question of constitutionality. Senators Bricker and Wiley exchanged some views on this point and some slight reference was made to it in the House, but practically all of the remarks in Congress, so far as they have been called to my attention, were directed to the economic problem of housing with no reference at all that I can find as to the necessity of this Act for the maintenance of a state of war. I must, therefore, place principal reliance on the preamble of the Act and Congress's own declaration of policy. As Congress itself stated, the principal object of the Act was to secure decontrol at the earliest possible moment and with the least possible impact upon the general economy and it is entirely clear from all the sources available, including the debates in Congress, that the Act could never have passed without the local option provisions. They were the means principally relied upon as a way of returning the Government to the States and subdivisions immediately. Without these provisions there would be no way of decontrolling an area except through the powers given the administrator, and it is entirely clear from the local option provisions themselves that Congress did not consider those administrative means as adequate for accomplishing its declared purpose. Section 305 shows only an intention of congress that if some single provision of the Act as applied to some particular circumstance should be held unconstitutional it should not affect the remainder of the Act. Congress did not say nor could it say that if the most vital portions of the Act were invalid the remaining fragments should prevail. It is my opinion that the unconstitutional portions of this Act, if considered with its preamble, greatly outweigh all of the other provisions for decontrol.

This view of the case in my opinion is fully sustained by the majority opinion in Carter v. Carter Coal Co., 298 U. S. 238. The saving clause in that case was identical with the saving clause in this one, and everything that was said in the majority opinion in that case, beginning on page 312, is applicable to the case now under consideration. There is little point in my repeating it here because I consider myself bound by it and firmly believe it

to be sound law. It is written in accordance with the general rule of frequent application that if the valid and invalid parts of a law are so bound together that the invalid part is a material inducement to the valid portion then the whole is necessarily invalid. I believe that is the situation in this case.

There is one more reason for holding this law indivisible and I think it is a conclusive one—one that closes the door on the argument. Had the Congress desired and intended to continue rent control without these local option clauses it could have done so by a simple Act extending the expiration date of the then existing law.

It follows that I must necessarily find the entire Act invalid and being invalid this Court has no jurisdiction. The judgment will, therefore, be that the cause now is dismissed for want of jurisdiction.

(S) ELWYN R. SHAW,
United States District Judge.

18 In the United States District Court for the Northern District of Illinois, Eastern Division

Civil Action No. 48–C–1023

UNITED STATES OF AMERICA

v.

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION, J. M. NICHOLSON, ROBERT R. LUMSDEN, NATHAN SUCHERMAN, MILTON TINSLEY, FRANK FERRARO, HELEN FERRARO, JOHN J. CHALMERS, SAMUEL SILVERMAN, ARTHUR J. CASEY, MAURICE LIPKIN, CHARLES E. KOCH, CHARLES H. BRANDT, CLIFFORD CULLODEN, JEROME A. CUTLER, HARRY TARLER, EUGENE B. FEINGOLD, HERBERT S. KOHN, AND IRVING KALLICK

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION, THIRD PARTY PLAINTIFF

v.

JAMES W. WATSON, WASHBURN S. LYON, WILLIAM P. LITTELL, HAROLD SHILLING, LILLIAN SWING, J. J. CAVANAGH, ISADORE H. BESSER, STELLA COUNSELBAUM, JOSEPH NEIDLINGER, MRS. FRANK S. MCCOOL, R. H. KEELING, JAMES F. NOLAN, HARRY A. DOBER, MILTON M. FRIEDMAN, BERTHA LEVY, HAROLD L. STILLMAN, FRANK D. WARNER, B. R. HOPPER, SAMUEL SILVERMAN, ARTHUR CASEY, MAURICE LIPKIN, CHARLES E. KOCH, CHARLES H. BRANDT, CLIFFORD CULLODEN, JEROME A. CUTLER, HARRY TARLER, EUGENE B. FEINGOLD, HERBERT S. KOHN, IRVING KALLICK, AND MORRIS LEVENKIND, THIRD PARTY DEFENDANTS

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Judgment

July 26, 1949

After due deliberation and the Court being fully advised in the premises, files herein its memorandum opinion in accordance with which it

Ordered that this cause be and it is hereby dismissed for want of jurisdiction.

20 In the United States District Court

[Title omitted.]

Petition for appeal

Filed August 23, 1949

United States of America, plaintiff herein, considering itself aggrieved by the final judgment of the Court entered herein on July 26, 1949, for the reasons set forth in its assignment of errors which is filed herewith, hereby prays an appeal from said judgment to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court plaintiff presents to this Court herewith a statement particularly disclosing the basis of jurisdiction of the Supreme Court to entertain an appeal and review said final judgment in question.

Plaintiff prays that this appeal may be allowed and that citation be issued as provided by law, and that a transcript of the
21 record, proceedings, and documents upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

Filed at Chicago, Illinois, this 23d day of August 1949.

Ed Dupree,
ED DUPREE,
General Counsel,
Cecil H. Lichliter,
CECIL H. LICHLITER,
Special Litigation Attorney,
Office of the Housing Expediter, Washington 25, D. C.,
William S. Kaplan,
WILLIAM S. KAPLAN,
Chief, Litigation Section,
Office of the Housing Expediter, 226 West Jackson Boulevard, Chicago 6, Illinois,
Attorneys for Plaintiff.

22 In the United States District Court

[Title omitted.]

Assignment of errors

Filed August 23, 1949

United States of America, plaintiff in the above-entitled cause, files the following assignments of error on which it will rely upon appeal to the Supreme Court of the United States from the final judgment of this Court entered on the 26th day of July 1949:

The Court below erred:

1. In holding Section 204 (j) and the several subsections thereof, of the Housing and Rent Act of 1949 (Public Law 31, 81st Congress) to be unconstitutional and void as an unlawful delegation of the war powers of Congress.

2. In holding the entire Housing and Rent Act of 1949 to be invalid because of the inclusion therein of said Section 204 (j).

23 3. In failing to give effect to the separability clause of the said Act, Section 305 thereof, which renders said Section 204 (j) separate and divisible from the remaining provisions.

4. In dismissing the cause for lack of jurisdiction upon the finding that the entire Housing and Rent Act of 1949 is invalid.

Wherefore, plaintiff prays that the said judgment of the District Court dismissing the cause be reversed, and that the cause remanded for entry of a decree granting the relief as the supplemental complaint prayed.

Filed at Chicago, Illinois, this 23d day of August 1949.

Ed Dupree,
ED DUPREE,
General Counsel,
Cecil H. Lichliter,
CECIL H. LICHLITER,
Special Litigation Attorney,
Office of the Housing Expediter, Washington 25, D. C.,
William S. Kaplan,
WILLIAM S. KAPLAN,
Chief, Litigation Section,
Office of the Housing Expediter, 226 West Jackson Boulevard, Chicago 6, Illinois,
Attorneys for Plaintiff.

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25-70 In the United States District Court

[Title omitted.]

Order allowing appeal

August 23, 1949

It appearing to the Court that the plaintiff, United States of America, has filed herein a petition for appeal to the Supreme Court of the United States, together with an assignment of errors praying for a reversal of the judgment entered July 26, 1949, dismissing the within action, and also a statement as required by Rule 12 of the Supreme Court Rules, disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question,

It is ordered that the appeal prayed for be, and the same is, hereby allowed and granted to the Supreme Court of the
71 United States from the judgment rendered in this cause as aforesaid.

It is further ordered that plaintiff be, and it is, hereby allowed a period of 60 days from the date of this order within which to appeal and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 23d day of August 1949.

PHILIP L. SULLIVAN,
Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division.

73 In the United States District Court

[Title omitted.]

Praecipe for record on appeal

Filed August 23, 1949

To the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

You are hereby requested to prepare a transcript of record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed herein, and to include in such transcript the following:

1. Supplemental complaint in name of United States of America filed by leave of Court June 23, 1949.

2. Motion of defendant Robert R. Lunsden to dismiss supplemental complaint.

3. Motion of defendant Shoreline Cooperative Apartments, Inc., and third party defendant Samuel Silverman, et al., to dismiss supplemental complaint.

4. Opinion of Honorable Elwyn R. Shaw, District Judge, filed July 25, 1949.

5. Judgment entered July 26, 1949, dismissing the action.

6. Petition for appeal.

7. Statement of Jurisdiction.

74 7 (a). Statement Directing Attention of Defendants to Provisions of Paragraph 3, Rule 12 of the Rules of the Supreme Court of the United States.

8. Assignment of errors.

9. Order allowing appeal.

10. Citation.

11. Praecipe for record on appeal.

12. Proof of service of:

a. Petition for appeal

b. Order allowing appeal

c. Assignment of errors

d. Statement as to jurisdiction

e. Citation

f. Praecipe for transcript of record

g. Statement Directing Attention of Defendants to Provisions of Paragraph 3, Rule 12 of the Rules of the Supreme Court of the United States.

Filed at Chicago, Illinois, this 23d day of August 1949.

75 In the United States District Court

Notice of appeal

KENART M. RAHN,
7 South Dearborn Street, Chicago, Illinois (3), Attorney for Robert R. Lumsden.
STIEFEL, GREENBERG & BURNS,
77 West Washington Street, Chicago, Illinois (2), Attorneys for J. M. Nicholson, Frank Ferraro and Helen Ferraro.
MARKS & MARKS AND LEVY, GOLDBERG & LAWRENCE,
1 North LaSalle Street (2), Chicago, Illinois.
THOMAS J. CAVANAGH,
66 East South Water Street, Chicago, Illinois (1).
TURNER, HUNT & DEBOLT,
134 South LaSalle Street, Chicago, Illinois (3), Attorneys for Nathan Sucherman.

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GOLDBERG & LEVIN,
33 North LaSalle Street, Chicago (2), Illinois, Attorneys for Shoreline Cooperative, Apartments, Inc., a corporation; Milton Tinsley, John J. Chalmers, Samuel Silverman, Arthur J. Casey, Maurice Lipkin, Charles E. Koch, Charles H. Brandt, Clifford Culloden, Jerome A. Cutler, Harry Tarler, Eugene B. Feingold, Herbert S. Kohn, and Irving Kallick.

GANN, SECORD, STEAD & MCINTOSH,
135 South LaSalle Street, Chicago, Illinois (3).

You and each of you are hereby notified that on Tuesday, August 23, 1949, at the opening of court in the forenoon, or as soon thereafter as counsel can be heard, the undersigned shall appear before the Honorable Philip L. Sullivan, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division, in his courtroom in the United States Courthouse, Chicago, Illinois, or in his absence before such other judge as may be sitting in his place and stead, and shall then and there present for filing, the petition of the plaintiff herein for direct appeal to the Supreme Court of the United States from the final judgment entered in the above cause on July 26, 1949, together with an assignment of errors and a statement as to jurisdiction, all pursuant to Rule 72 of the Federal Rules of Civil Procedure and the Rules of the Supreme Court of the United States in such cases made and provided.

You are further notified that on the day and date aforesaid and at the time designated, the undersigned shall move the above court for an order allowing the appeal to the Supreme Court of the United States from the aforesaid judgment.

You are further notified that on the day and date aforesaid and at the time and place hereinabove set forth, plaintiff
76 shall further move the court, pursuant to Section 1651 of the Judicial Code, as amended (Title 28 U. S. C. A.), Rule 36 of the Rules of the Supreme Court of the United States and Rule 62 (c) of the Federal Rules of Civil Procedure, for an injunction, restraining order, stay, or other appropriate order, to preserve the status quo of the subject cause during the pendency of the appeal herein to the Supreme Court of the United States.

Pursuant to the Rules of the Supreme Court of the United States in such cases made and provided, there is herewith served upon you copies of the above motions, etc., hereinabove set forth and more particularly described as follows:

1. Petition for Appeal from the District Court to the Supreme Court.
2. Assignment of Errors.

3. Statement as to Jurisdiction.

4. Statement directing Attention of Defendants to Provisions of Paragraph 3, Rule 12 of the Rules of the Supreme Court of the United States.

5. Order Allowing Appeal.

6. Motion of Plaintiff for an Injunction, etc., to Preserve the Status Quo of the said Cause During the Pendency of the Appeal to the Supreme Court of the United States.

7. Order Granting Injunction During the Pendency of the Appeal.

Dated at Chicago, Illinois, this 22nd day of August 1949.

Ed Dupree,
ED DUPREE,
General Counsel,
Cecil H. Lichliter,
CECIL H. LICHLITER,
Special Litigation Attorney,
Office of the Housing Expediter, Washington 25, D. C.
William S. Kaplan,
WILLIAM S. KAPLAN,
Chief, Litigation Section,
Office of the Housing Expediter, 226 West Jackson Boulevard, Chicago 6, Illinois,
Attorneys for Plaintiff.

Received a copy of the foregoing Notice together with copies of all documents therein mentioned, this 22nd day of August 1949.

TURNER, HUNT & DE BOLT.
GANN, SECORD, STEAD & MCINTOSH.
STIEFEL, GREENBERG & BURNS.
KENART M. RAHN.
MARKS AND MARKS LEVY, GOLDBERG & LAWRENCE.
GOLDBERG & LEVIN.
THOS. J. CAVANAGH.

80 [Citation in usual form showing service on Robert R. Lumsden and others omitted in printing.]

82 [Clerk's Certificate to foregoing transcript omitted in printing.]

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83 Supreme Court of the United States

No. 334, October Term, 1949

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHORELINE COOPERATIVE APARTMENTS, INC., ET AL.

Order noting probable jurisdiction

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted, October 17, 1949.

Mr. Justice Douglas took no part in the consideration or decision of this question.

84 In the Supreme Court of the United States

October Term, 1949

No. 334

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHORELINE COOPERATIVE APARTMENTS, INC., A CORPORATION, ET AL.

Statement of points to be relied upon and designation of record for printing

Filed October 22, 1949

Pursuant to Rule 13, paragraph 9 of this Court, the Appellant states that it intends to rely on all of the points in its Assignment of Errors.

The Appellant deems the entire record, as designated in its praecipe for transcript of record heretofore filed in the United States District Court for the Northern District of Illinois, Eastern District, necessary for the consideration of the points to be relied upon.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 21, 1949.

[Endorsement on cover:] File No. 54083. U. S. D. C., Northern District of Illinois. Term No. 334. The United States of America, Appellant, v. Shoreline Cooperative Apartments, Inc., a corporation; J. M. Nicholson, Robert R. Lumsden, et al. Filed September 13, 1949. Term No. 334 O. T. 1949.

U. S. GOVERNMENT PRINTING OFFICE: 1949